

(Original)

Docket No. 2001-1 CARP DSTRA2
Docket No. 2001-2 CARP DTNSRA

Digital Performance Right in Sound
Recordings Rate Adjustment Proceedings

Reply Comments

Docket No. 2001-1 CARP DSTRA 2
Reply Comments

1. DiMA
2. RIAA/AFTRA/AFM
3. XM/Sirius

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C.

ORIGINAL
RECEIVED

JAN 22 2002

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of)	
)	Docket No. 2001-1
Digital Performance Right in)	CARP DSTRA 2
Sound Recordings)	and
Rate Adjustment Proceedings)	Docket No. 2001-2
_____)	CARP DTNSRA

REPLY COMMENTS OF DIGITAL MEDIA ASSOCIATION

In its initial Comments in response to the Notice of Inquiry¹, the Digital Media Association ("DiMA") supported consolidation of the two above-captioned subscription service proceedings into a single arbitration for four principal reasons:

- Each arbitration would include a substantial volume of common evidence concerning business models, competition and license rates and terms in these subscription service markets and in analogous markets. Subscription services share the essential attributes of making available to subscribers, for a fee, large numbers of channels of genre-specific programming created by the services within the scope of the statutory license. The major distinction among them is the means of transmission, not the essential nature of their businesses or services. Therefore, consolidation would avoid substantial duplication in the parties' presentations to the arbitrators.
- Consolidation would result in a richer evidentiary record in which the arbitrators would hear directly from witnesses representing all types of relevant subscription services, and

¹ Notice of Inquiry and Request for Comments published by the Copyright Office at 66 Fed. Reg. 58180 (November 20, 2001).

experts would present a more insightful and comprehensive analysis of the relevant markets and economics based on information gained directly from all companies.

- Consolidation would save expense and time in the administration of the CARP proceedings by eliminating the presentation of duplicative motions, testimony and evidence in separate proceedings.
- To the extent that license rates are set along a spectrum in the zone of reasonableness, consolidation would result in greater consistency in the legal rationales underlying the setting of rates and terms applicable to each type of subscription services (as well as their relation to the rates and terms set in other arbitrations).

The comments of other potential participants in the pre-existing services arbitration oppose consolidation primarily out of a concern that arbitrators might find difficulty in applying the correct legal standards to determine separate rates for pre-existing and new services. DiMA respectfully submits that this contention is, at best, wholly speculative, and demonstrates a surprising lack of confidence in the capability of arbitrators to correctly apply the law.² The pre-existing services' fears are particularly ill-founded inasmuch as the arbitrators will be acting upon established precedent in interpreting the applicable legal standards for each type of services. The standards and factors for pre-existing subscription services, including each of the relevant statutory factors, were explained by the Librarian in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25394 (May 8, 1998). The correct application of the "willing buyer/willing seller" standard to new subscription services will

² Indeed, the process of adjudication typically calls upon judges and arbitrators to evaluate the same series of facts according to different legal theories and causes of action, each with different standards and statutes of limitation, and to decide each claim fairly and independently from other claims in suit.

be explicated in the forthcoming decision in Digital Performance Rights in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA1&2. Similarly, there is no magic or mystery in the fact that different time periods apply for each license (five years for pre-existing services and two years for new services), so this, too, poses no obstacle to consolidation.³

Clearly, the arbitrators will be more than capable of reaching well-reasoned determinations for each of the licenses to be addressed in a consolidated case. Thus, the only issue that should be considered by the Copyright Office is the extent to which consolidation will benefit the parties and the process, by reducing duplicative administration and evidence. DiMA believes that the overlap in business and programming models, market analyses, expert opinions and witness testimony more than justifies consolidation of these two subscription service proceedings.

Notwithstanding, in consideration of the concerns voiced by other CARP participants, DiMA proposes an alternative that in effect gives the benefits of consolidation while imposing procedures upon the arbitrators that will emphasize the need for separate determinations for the two types of subscription services. Should the Copyright Office deem it prudent to keep the two hearings separate, DiMA suggests the following:

1. The same arbitration panel should hear the cases in both dockets, and determine the rates and terms for both licenses.

³ Moreover, failure to consolidate could prejudice the services that participate in the second proceeding but not the first. Copyright owners and performing artists' representatives (who will participate in both arbitrations), as well as their experts, would have the substantial advantage of advance access to relevant evidence concerning the first subscription services, whereas those services (and their experts) that participate only in the second arbitration may not obtain access to the same relevant information until the second arbitration is well underway.

2. Written cases in each docket should be submitted simultaneously by the parties. Evidence submitted in either docket should be deemed admissible in the other. Parties to either docket should be permitted access to evidence and testimony in the other, pursuant to protective order.

3. The two hearings should be conducted separately, but consecutively (i.e., direct case in the pre-existing services arbitration would be followed by the direct case in the new services arbitration; rebuttal case in the pre-existing services arbitration would be followed by the rebuttal case in the new services arbitration).

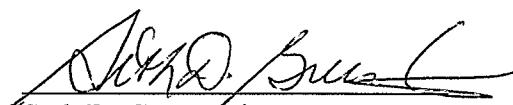
4. The arbitrators should issue separate reports for each docketed proceeding.

DiMA respectfully submits that these procedures will provide complete assurance that each case will be evaluated independently according to the applicable separate standards, while allowing the parties, the arbitrators and the Copyright Office to benefit from a richer record and greater efficiencies in administration.

WHEREFORE, the Digital Media Association requests that the two above-referenced subscription service proceedings be consolidated or, in the alternative, that the arbitrations proceed consecutively, as proposed herein.

Respectfully submitted,

Date: January 22, 2002



Seth D. Greenstein
MCDERMOTT, WILL & EMERY
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorney for Digital Media Association, Inc.